United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-6099

To be argued by
Morris Rubin

United States Court of Appeals

For the Second Circuit.

EDWARD G. SANTANGELO,
Plaintiff-Appellant,

against

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,
Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

EDWARD G. SANTANGELO,
Plaintiff-Appellant

v.

JOSEPH A. CALIFANO, JR.,
Secretary of Health, Education
and Welfare
Defendant-Appellee

Docket # 77-6099

PRELIMINARY STATEMENT

Plaintiff-Appellant brings this Appeal from a Judgment of the Hon. George C. Pratt, District Court Judge, United States District Court, Eastern District of New York, made May 16, 1977 and entered May 19, 1977, on submission of crossmotions for summary judgment, granting defendant's motion and denying plaintiff's motion.

Plaintiff-Appellant claimed disability insurance benefits under the Social Security Act, as amended, by his application filed July 23, 1973. His claim was disallowed September 17, 1973, and after a request for reconsideration, the disallowance was affirmed December 20, 1973.

After a hearing upon timely request, an Administrative Law Judge made a decision June 16, 1975 denying benefits to the Plaintiff-Appellant, which decision was adopted by the Appeals Council on August 27, 1976, thus becoming the final decision of the Secretary.

An action was brought under Section 205 (g) of the Social Security Act, as amended, 42 U.S.C. Section 405 (g) for judicial review of the final determination of the Secretary of Health, Education and Welfare, which resulted in judgment for the defendant by the Hon. George C. Pratt, District Court Judge, as first above mentioned, and from which judgment this appeal is brought.

ISSUE

The issue is whether the Plaintiff-Appellant was and is disabled within the meaning of the Social Security Act, as amended; and whether, on the entire case, the Administrative Law Judge's decision, which became the final decision of the Secretary, is supported by substantial evidence.

THE FACTS

(Reference to Transcript Record is abbreviated as TR--)

Plaintiff was born September 10, 1920 in Wilmerding, Pennsylvania and completed elementary and high schools.

He enrolled in a two-year business administration course at Pace College but did not progress in or complete the course. He took some of the courses, but had to drop out because he failed Accounting and was unable to understand (TR 30); and he was unable to keep up with college work and abandoned it because of poor grades (TR 131, 133).

His first employment at age 18 was as a clerk with the Radio Corporation for about 2 years (TR 30). In August, 1942 he entered the Military Service and was assigned to the Artillery. He served until February, 1946 (TR 31). His initial training was in the Artillery, and the explosion of shells affected his hearing and exacerbated a pre-existing trouble with his ears (TR 30, 131, 96, 106, 111, 121, 124).

Upon leaving the Military Service, Plaintiff-Appellant became employed by the American Express Company where he worked for 20 years, advancing from a correspondent to an assistant inspector in charge of investigations (TR 32). He was in charge of fraud investigations and supervised other personnel. In the course of this work he communicated and was necessarily in contact with law enforcement officials, and he supervised 80 employees. (TR 67, 74, 75, 133).

In April, 1965, his performance on the administrative and investigatory level began to deteriorate because of his defective hearing and this came to the attention of his superiors. The threat of losing his job and his loss of hearing resulted in a continuing and worsening anxiety neurosis and psychological and emotional impairments, to be more fully set forth hereinafter. (TR 111).

A friend was able to obtain a similar position for him at the First National City Bank, now Citicorp., on an administrative,

investigative level where he worked from 1965 to March, 1972 (TR32). For a time he was able to conceal his impairments, but he was soon discovered; his performance suffered, and his anxiety, depression and psychological impairment became even more severe (TR 111). He worked as long as he could, and on March 15, 1972, the combination of ailments, low back derangement, complete loss of hearing in left ear and partial loss in right ear, and severe depression, anxiety neurosis and emotional impairment caused him to be unable to continue working (TR 33, 54, 72).

Dr. Philip Pross, M.D., plaintiff's physician, responding to a request from the Bureau of Disability Determinations, on August 9, 1973, certified that he first saw plaintiff 3/3/72 and last saw him that day, 8/9/73; his diagnosis was:

> "Total loss of hearing - left ear, partial loss of hearing - right ear, low back derangement, sciatica syndrome right leg, question of epilepsy approx. 4 yrs. prior, has Electroencephlogram. Tension state. Chronic external Otitis".

Symptoms or chief complaints were:

> "Loss of hearing, nervousness, back and leg pain, loss of balance, dizziness, headaches".

Laboratory data:

> "Had EEG approximately 4 years ago. VDRL negative"

Prognosis: "Unfavorable"

> "100% disability granted by Veterans Administration"

(TR 91, 92)

The Veterans Administration furnished a statement (TR 87-90)

showing "Doctor's Progress Notes" from May 24, 1972 to October 11, 1972, attaching an Audiometric Examination of 5/24/72, and reflecting that they issued to plaintiff a Zenith Hearing Aid as a result thereof.

However, on January 22, 1975, the Veterans Administration furnished further reports of examinations and hearings held in May, 1973 and July, 1973, including a detailed neuropsychiatric report of their psychiatrist, Dr. Walter Abeles, M.D., (TR 103-113).

We digress momentarily to point out that the Administrative Law Judge in his evaluation of the evidence, referred only to "treatment at the Veterans Administration from May 24, 1972 to October 11, 1972 ---" (TR 12), studiedly disregarding the examinations, psychiatric reports and hearings had in 1973.

On May 31, 1973, Dr. Abeles conducted a neuropsychiatric examination of the plaintiff. (TR 111-113). He took an extensive history which is not set forth at length here, having already been stated elsewhere herein, except that he found it relevant and noteworthy that "because of his defective hearing --- he was in a state of marked anxiety and tension, fearing that the discovery of his condition would bring about the loss of his job." "--- because of his difficulties --- his emotional state has become markedly worse. He has become quite depressed." "He has frequent attacks of acute anxiety --- and these express themselves now in the form of hives on his skin with itching, and makes his anxiety and depression worse."

In assessing the plaintiff's Mental Status: (TR 112) Dr. Abeles found it significant that plaintiff did not try to exaggerate his condition, that he impressed him as being "sincere in his statement that he would more than want to be employed, rather than to have to depend on any benefits."

Dr. Abeles stated, "It is evident throughout the interview that he is in a state of marked anxiety and tension, as can be seen from the expression on his face --- and eyes."

Dr. Abeles further gave his "DIAGNOSIS: Anxiety Neurosis INCAPACITY: Severe."

Under Remarks: Dr. Abeles said that the anxiety state, "which is of a chronic nature" is related to his hearing defect, and that "Anxiety is now present to an increased degree and expresses itself in anxiety, tension and somatic symptomatology, in the form of skin eruptions as well as in a depressive state." (TR 113).

After a hearing, and consideration of medical and psychiatric reports, the Veterans Administration rendered a Rating Decision, July 12, 1973, finding the plaintiff totally unemployable, based on "Anxiety Neurosis; Deafness, Complete Left Ear: Mild Right Ear, "F" and "A", With Complaint of Ringing in Ears; Otitis Externa, Bilateral, Etiology, Fungus." (TR 106).

Dr. Philip Pross, on October 1, 1973, and April 23, 1974, again set forth his opinion that "due to severity of his hearing loss he has developed a severe nervous condition" and that he "also suffers from deterioration of the lumbar disc and sciatica syndrome

causing him much pain ---" and that "Mr. Santangelo requires continuous treatment for infections of his ears, medication for his nervous condition, and physiotherapy treatments to his back." It was Dr. Pross' opinion that plaintiff's condition was permanent. (TR 93, 94).

Dr. Joseph Illovsky, M.D., a Government-assigned psychiatrist, examined the plaintiff November 8, 1973 and reported that plaintiff "uses excessive rationalization. His conversation is superficial. His affect is blunted and his mood indifferent," and "His insight and judgment are impaired". As his Disgnosis, Dr. Illovsky reported, "Psycho physiologic disorder of special sense (hearing) 305.8". He discussed the origin and development of hearing loss based on a hypothesis of "war neurosis" and stated that "He also has a certain amount of nervousness and depression added to his condition, which incapacitates him to function". He recommended psychotherapy and gave his prognosis as "Guarded." (TR 96, 97).

In signed statements at the Social Security District Office in July, 1973, plaintiff responded "My hearing is diminished. My nervous condition prevents me from staying in one place for any length of time. I don't sleep at night. I suffer from dizziness, headaches and loss of balance". (TR 68) and again at the District Office in September, 1973 he indicated that his hearing condition "brought on a severe nervous condition which has now gotten so severe that I have no confidence in myself in the business world

and also socially. Ny nerves cause me to pass out at times". (TR 75) and further that "this happens when I become annoyed or embarrassed. My nerves also cause me to lose my balance sometimes and frequently cause dizziness and headaches. Any new situation causes me great anxiety. The thought of keeping an appointment keeps me from sleeping." (TR 76)

At the Administrative Law Judge's hearing, plaintiff testified that he never married, lived with a brother and sister, likewise unmarried; that he cannot drive an automobile; that his brother drives him where he must go; that he arises before 7:30 o'clock in the morning, but that it takes him a half-hour to three quarters hour to get out of bed because of his sciatica condition and deterioration of a lumbar disc; that a neighbor comes over for a while to talk to him; he reads a newspaper; watches a little bit of television; he can't hear at all out of his left ear, but can hear out of right ear; he can walk no more than a couple of blocks (TR 33-36).

He also testified that on Dr. Pross' direction he sleeps on a bedboard, and he receives injections upon bad pain. He takes Demoral, Myltown and Valium (TR 38). He has recurring, gnawing, stabbing pains; has difficulty putting on shoes or stockings, needs help sometimes; he is restless and can't get to sleep. He uses a heat lamp once a day and takes sitz baths twice a day; he has no social life at all; he feels ridiculed, embarrassed. (TR 39, 40). He wears a back brace ordered by the Veterans Administration (TR 43)

At about this point, the Administrative Law Judge commented"

> "I see a very agitated man moving around constantly in front of me here today at this hearing and I want that on the record"
>
> (TR 44)

These same indications of agitation were also observed by others in the processing of plaintiff's claim. For example, on reporting his observations of the plaintiff, October 2, 1973, a Social Security Claims Representative, W. Roach, stated:

> "IX. A. OBSERVATIONS
>
> Was brought in by brother. Claimant says he can't travel alone too much.
>
> Was visibly nervous. Had nervous mannerisms, the way he talked, expression on face."
> (TR 78).

On May 31, 1973, on Neuropsychiatric examination, among other things, more appropriately discussed above, Dr. Walter Abeles, M.D. of the Veterans Administration observed:

> "It is evident throughout the interview that he is in a state of marked anxiety and tension, as can be seen from the expression on his face. The marked tension expression itself in his posture and anxiety radiating from face and eyes." (TR 112)

On May 28, 1975, a psychologist assigned by the Secretary for consultative examination, Dr. Ann F. McHugh, Ph.D., observed:

> "He ---- is verbally overproductive, and continuously moves his hands in an anxious fashion, placing hand to mouth and rubbing himself". (TR 129)

On May 8, 1973, a Government assigned psychiatrist, Dr. Martin

Rudoy, observed:

> "He swayed in the upright position with his eyes closed, in all directions --- there was much tension and hesitancy in the movement of his arms --- There was marked sweating of the palms, axillae, and the soles of his feet --- He was tense and anxious ---." (TR 134).

In any event, the Administrative Law Judge, at the conclusion of plaintiff's testimony on March 13, 1975, ordered further consultative examinations by Dr. Jacob Turkell, an Orthopedist, Dr. Martin Rudoy, a Psychiatrist, and Dr. Ann McHugh, a Psychologist. (TR 44) He also required that the claimant produce some proof that the Veterans Administration had ever examined or treated him or x-rayed him for his back condition (TR 43). His decision, obviously, was to abide the receipt of those reports. (TR 44).

Nevertheless, without waiting for these additional proofs, he next called to testify, on March 13, 1975, Dr. Charles P. Fonda, Psychologist, not a medical doctor, a vocational expert on the panel of the Social Security Administration (TR 45). Dr. Fonda stated that he was testifying based on "observations that I've been able to make today", March 13, 1975, and on the file as it existed as of that day, March 13, 1975 (TR 48).

The certified record and transcript shows that within the next two or three months after the completion of Dr. Fonda's testimony, the Administrative Law Judge received additional important, cogent evidence from the Veterans Administration, and from the various Government assigned consultative examiners, Drs. Weiselberg,

Turkell, McHugh and Rudoy; that the hearing was reopened June 2, 1975 to receive these exhibits, but that they never were seen or considered by the Vocational Expert, and never were part of any hypothesis posed to the Vocational Expert who had concluded his testimony on March 13, 1975 (TR 52, 53).

So that, on March 13, 1975, Dr. Fonda testified that his observations of that day and the information in the file did not present to him "conclusive indications of unemployability"; that "his physical condition seems not to be overwhelmingly incapacitating"; that he should find an occupation other than his previous work, of lesser responsibility, communication and interaction; that there are "very numerous" jobs of the clerical kind in this area; he recited such jobs as sorting clerk, insurance or safekeeping clerk, coding, compiler, mail clerk; or power press tender, spinning lathe operator or assembly press operator. He said these jobs are classified as light or sedentary (TR 50, 51). As to the manner of making a vocational evaluation, Dr. Fonda stated he "reviews the information on file" and makes an "estimate of the residual functional capacity" and then he "surveys" various "occupations" and "Investigation" is then conducted by means of interviews with personnel people ---- and published documents and information to determine the existence of such jobs and what they involve and so on" and that he checks newspaper classified advertising. (TR 45, 46).

Thereafter, on June 2, 1975, the following medical evidence was received and placed into evidence: (TR 52)

A report from the Veterans Administration showing that on October 2, 1973 plaintiff was x-rayed and "x-rays show moderate lipping of lumbar bodies and some slight compression of disc between L5/S1. Lumbosacral belt advised" signed by a doctor (illegible) (TR 120).

A report from a Government-assigned radiologist, Dr. Hyman M. Weiselberg, M.D., dated May 2, 1975, showing among other things "a mild scoliosis of the lumbar spine with convexity to the left -- Minimal spurring is present in the upper anterior articular margins of L2, L3 and L4 --- IMPRESSION: --- Minimal osteoarthrosis involving the lumbar vertebral bodies as noted.---" (TR 122).

Dr. Jacob Turkell, M.D., orthopedist assigned by the Government reported May 3, 1975, that he examined plaintiff who was "driven by brother" to office; setting forth history and numerous orthopedic investigative tests and comments, and reporting that he reviewed Dr. Weiselberg's x-rays and verified his findings, but that in addition he also found a developmental 6th lumbar sacralized vertebra. He reported his "Opinion: the claimant has physiological discogenic changes compatible with and not infrequently seen in individuals of this age group." (TR 124, 127)

Dr. Ann McHugh, Ph.D., psychologist assigned by the Bureau of Disability Determinations at the request of the Administrative

Law Judge, reported that on May 3, 1975 she examined the plaintiff for intellectual, personality and organicity evaluation; that she administered tests as follows: Wechsler Intelligence, Bender Gestalt, Rorschach and Figure Drawings. Among her observations she reports he was 45 minutes late, he was driven there by his brother. He was verbally overproductive, and continuously moved his hands in anxious fashion, placing hand to mouth and rubbing himself. He exhibited testimonials to his work record and accounts of his symptoms alleged to stem from his hearing loss and inability to work including restlessness, concentration difficulty, irritability, anxious headaches, depression, hives, diarrhea, goose flesh, palpitations, dizziness and feeling off balance.

Dr. McHugh's test results showed that while he appeared average intellectually, and in vocabulary and reasoning, understanding, judgment, attention, "the Bender Gestalt reproductions suggest intact visual motor organization and average visual recall in an anxious, immature individual who is dependent, rigid, weakly separated, poorly related, and lacking drive. Personality picture is that of a helpless feeling individual who is psychosexually poorly related; is inadequate feeling; is unable to tolerate anxiety; and has little personality flexibility and resources for emotional adaption to new circumstances. He is very restricted and stiff and has no gratification from instincts. He has many passive wishes, has difficulty in dealing with hostile and aggressive feelings, and difficulty in facing up to problems. He appears

organically intact but emotionally impaired; he cannot make emotional adaptions and shows impaired self-sufficiency ---" (TR 129, 130).

Dr. Martin Rudoy, M.D., a psychiatrist, assigned by the Government, examined plaintiff on May 8, 1975, and reported that he observed plaintiff walked with a moderate limp and tilt of body to the right; he swayed in upright position in all directions with eyes closed; much tension and hesitancy in movement of his arms; cranial nerves showed diminished hearing in right ear and absence of hearing in left ear; there was imbalance with his eyes closed; marked sweating of palms, axillae and the soles of the feet; he was driven to the office by his brother; he was tense and anxious; insight was poor although judgment was fair; plaintiff is immature, dependent, rigid, lacking drive, anxious and filled with helpless feelings, unable to make an emotional adaptation.

For his opinion and diagnosis, Dr. Rudoy certified:

1. Deafness, left ear, partial loss of hearing right ear, cause undetermined, possibly and probably by exposure to explosions of artillery shells in World War II.

2. Adjustment reaction of adult life, manifested by resentment, depression, anxiety, irritability, hostile complaints, blaming inadequacies on others or other circumstances.

Prognosis for (1) is poor

(2) is guarded

On a listing of five gradations from "none" to "severe", Dr. Rudoy found his degree of impairment to relate to other people to be in the 2nd from the highest category - "Moderately Severe", and he estimated plaintiff's degree of restriction of daily activities to be the 2nd from the highest category "Moderately severe". Dr. Rudoy recommended Psychotherapy and/or medication on the basis of out-patient treatment at a mental hygiene clinic. (TR 134-136).

POINT I

THE PLAINTIFF HAD IMPAIRMENTS WHICH ENTITLED HIM TO DISABILITY INSURANCE BENEFITS

The extensive record, comprised of physician's and psychiatrists' reports, corroborated by Government-appointed consultative doctors, and considered in the context of the whole case, individually and in combination, constitutes substantial evidence that the plaintiff became disabled within the meaning of the Social Security Act on March 15, 1972.

We respectfully incorporate here, to avoid lengthy duplication and repetition, all the medical evidence, testimony and symptomatology set forth in THE FACTS, P. 2-15.

We state at once, however, that it remains undisputed that on March 15, 1972 the plaintiff became permanently and totally disabled from engaging in his former and usual occupation as an executive administrative officer and supervisor in charge of investigations. We must take this as a fact in view of the Administrative Law Judge's discussion and findings. (TR 13, 14). There the Administrative Law Judge stated:

> "Clearly, from all of the above medical evidence, the facts are clear that this claimant does have a significant psychiatric condition. However, he has been pushing himself to a point of obtaining positions to which he was barely qualified. He has tortured himself with regard to these conditions and has suffered distress and irritability by virtue of his failure to be able to perform in the style in which he felt he could do." (TR 13).

and that Dr. Fonda, the Vocational Expert, "felt that occupations of lesser responsibility --- certainly was (sic) indicated." (TR 13)

Indeed, nowhere in his findings did the Administrative Law Judge make an explicit finding that the plaintiff could do his former and usual work, but he talked only of other lesser jobs of a clerical nature, and what he deemed to be "light and sedentary manual jobs" (TR 14).

Therefore, there is no other conclusion than that based on substantial evidence the plaintiff had impairments which disabled him from engaging in his former occupation, and has met his initial burden of proving such impairments. Kerner v. Flemming, 283 F 2d 291 (2d Circ. 1960); Blalock v. Richardson, 482 F 2d 773, 775 (4th circ. 1972). However, it has been further held that once he establishes an inability to perform his usual occupation, the burden shifts to the Secretary to show that the claimant can perform a specific job to a substantial gainful degree that exists in significant numbers in the national economy. Taylor v. Weinberger, 512 F 2d 664,666 (4th circ. 1975); Hernandez v. Weinberger, 493 F 2nd 1120, 1122-23 (1st circ. 1974); Meneses v. Secretary of H.E.W. 143 U.S. App. D.C. 81, 442 F 2d 803,806 (1971).

In any event, the medical evidence adduced, all of which remains undisputed, showed that the plaintiff had suffered and was still afflicted with a combination of physiological discogenic disease, evidenced by x-rays of scoliosis of spine, spurring in

margins of L2, L3, L4 and 6th lumbar socralized vertebra, compression of disc between L5/S1, (TR 120, 122, 124, 127); total deafness in left ear, mild deafness in right ear, necessitating use of a hearing aid supplied by the Veterans Administration after verification by Audiometric Examination Test (TR 87, 90-92, 134); impaired insight and judgment (TR 96, 97). Further, Dr. Abeles of the Veterans Administration, found him to be suffering from a markedly worsening emotional state with frequent attacks of acute anxiety, with marked tension and anxiety. He found him to be severely incapacitated from anxiety neurosis, of a chronic nature and increased degree, with somatic symptomatology, skin eruptions as well as depressive state (TR 111-113).

After the hearing before the Administrative Law Judge, consultative physicians examining at the behest of the Secretary, reported that plaintiff was emotionally impaired with impaired self-sufficiency; with inability to adapt to new circumstances; was immature, unable to tolerate anxiety or deal with problems; dependent, rigid, lacking drive, filled with helpless feelings, psychosexually poorly related. These reports were made by Dr. Ann McHugh, Ph.D., a psychologist, and by Dr. Martin Rudoy, M.D., psychiatrist, both assigned by the Secretary. (TR 129, 130, 134-136).

In addition, Dr. Rudoy corroborated that the cranial nerves showed absence of any hearing in left ear, diminished hearing in right ear; and that the prognosis was poor for his hearing condition; guarded for the plaintiff's psychiatric impairment. Dr. Rudoy

recommended psychotherapy and medication at a mental hygiene clinic.

In fact, as stated above, the Administrative Law Judge conceded that, "the facts are clear that this claimant does have a significant psychiatric condition." (TR 13)

We will argue in POINT II the gross error as a matter of law of the Administrative Law Judge in failing to consider all of the impairments, physical and mental, in combination, but rather in considering them in a fragmented and separate manner (TR 14). However, his sole positive conclusion that plaintiff had "a significant psychiatric condition", even taken in isolation, falls within the Regulations promulgated by the Secretary under the Social Security Act.

Volume 20 of the Code of Federal Regulations (hereinafter CFR) Section 404.1506 sets up, in substance, the conclusive presumption that one whose condition falls in the listing of impairments described in appendix to Subpart P is deemed disabled from engaging in substantial gainful activity.

Section 404.1506(a) (1)+(2) states:

"(a) The Listing of Impairments describes, for each of the major body systems, impairment which-

(1) Are of a level of severity deemed sufficient to preclude an individual from engaging in any gainful activity; and

(2) Are expected to result in death or to last for a continuous period of not less than 12 months."

Subpart P, Section 12.04, dealing with functional, nonpsychotic mental disorders insofar as they are deemed to have met the requisite level of severity within the meaning of the Social Security Act, states as follows:

> Functional nonpsychotic disorders (psychophysiologic, psychoneurotic and personality disorders). Manifested by marked restriction of daily activities and constriction of interest and deterioration in personal habits and seriously impaired ability to relate to other people and persistence of one of the following:
>
> A. Demonstrable structural changes mediated through psychophysiological channels (e.g., duodenal ulcer); or
>
> B. Recurrent and persistent periods of anxiety, with tension, apprehension, and interference with concentration and memory; or
>
> C. Persistent depressive affect with insomnia, loss of weight, and suicidal ideation; or
>
> D. Phobic or obsessive ruminations with inappropriate, bizarre or disruptive behavior; or
>
> E. Compulsive, ritualistic behavior; or
>
> F. Persistent functional disturbance of vision, speech, hearing or use of a limb with demonstrable structural or trophic changes; or
>
> G. Life-long, habitual, and inappropriate patterns of behavior manifested by one of the following

1. Seclusiveness and autistic thinking; or
2. Antisocial or amoral behavior (including pathologic sexuality) manifested by: (a) inability to learn from experience and inability to conform with accepted social standards, leading to repeated conflicts with society or authority and (b) by psychopathology documented by mental status examination and the results of appropriate standardized psychological tests; or
3. Addictive dependence on alcohol or drugs, with evidence of irreversible organ damage; or
4. Pathologically inappropriate suspiciousness or hostility manifested by psychopathology documented by mental status examination and the results of appropriate, standardized psychological tests.

The mass of medical evidence adduced by the plaintiff, incidentally, supplied chiefly by Government appointed doctors, and his detailed testimony and statements of his extensive symptomatology, already discussed above and in THE FACTS, P 7-9, place the plaintiff clearly and fully within the Secretary's own Regulations, and constitute an abundance of substantial evidence.

Substantial evidence has been defined as "more than a scintilla, but less than a preponderance," THOMAS v. CELEBREZZE 331 F. 2d 541 (4th Cir. 1964). The Supreme Court has characterized it as "such relevant evidence as a reasonable mind might accept as

and mental, supported by substantial and objective medical evidence and clinical data. (TR 14).

In BITTEL v. RICHARDSON 441 F. 2d 1193, (3rd Circ. 1971) the Court of Appeals held that the Hearing Examiner erred in failing to consider the claimant's symptomatology. In reversing the denial of benefits, the Appeals Court further held that since the claimant complained of several illnesses suffered simultaneously with the heart failure, the combined effect of the impairments must be considered.

In the case of LENA DEVILLE v. SECRETARY OF H.E.W., U.S.D.C., W. Dist. of Louisiana, Opelousas Div. Civ. No. 18,570, 12/13/73, CCH U.I. Reports, 3/7/74, in considering a case in which claimant suffered "from a form of nervous stress and strain and emotional disturbance which, when aggravated by work, manifests itself in the form of peptic ulcers," and citing GOLD v. SECRETARY, 463, F. 2nd 38, 41 (2nd Cir. 1972), granted summary judgment to the plaintiff, stating:

> "We find that the Hearing Examiner's decision is not supported by substantial evidence in that ignored the testimony of the plaintiff and her treating physician, substituted his own lay knowledge and experience in the place of uncontroverted medical evidence, and placed undue emphasis on only a portion of the record without considering the record as a whole.
>
> "The (examiner) has not viewed the record as a whole. He has almost wholly discounted the uncontradicted, unexplained and undenied testimony and the reports of the two (doctors). He has placed undue reliance on one portion of the record, --- to the disregard of overwhelming evidence to the contrary" BELLIPS v. RICHARDSON, 344 F. Supp. 812, 816 (W.D. Va. 1972)."

> Chief Judge Biggs of the Third Circuit, sitting in KLIMASZEWSKI v. FLEMMING, D.C.E.D. Pa. 1959, 176 F. Supp. 927, 932, in determining the sufficiency of the evidence to sustain the Secretary's denial of disability benefits, construed the word "any" as used in the definition of disability: "The claimant's proof that he is not qualified to engage in any substantial gainful activity is not adequately countered by the Administration's suggestions of possible employment. The word "any" must be read in the light of what is reasonably possible not of what is conceivable. The statute must be given a reasonable interpretation. It is a remedial statute and must be construed liberally. It was not the intention of Congress to impose a test so severe as that required by the Secretary and to exact as a condition precedent to the maintenance of a claim the elimination of every possibility of gainful employment."

We respectfully submit that based on all of the foregoing, in considering the case as a whole, and in its entirety, the plaintiff suffered from a combination of impairments, physical and mental, which disabled him from substantial gaingul activity, and entitled him to disability benefits.

POINT II

THE FINDING THAT THE PLAINTIFF COULD PERFORM LIGHT, SEDENTARY JOBS EQUATED AS SUBSTANTIAL GAINFUL ACTIVITY IS FALLACIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

We respectfully submit that it has been held that the "Court on review must make a "searching investigation" of the entire record to determine if substantial evidence for the Secretary's decision does exist". FLACK v. COHEN, 413 F. 2d 278, 280 (4th Cir. 1969).

Such a close review will show that the Administrative Law Judge failed to pose a fair and full hypothetical question to the vocational expert, Dr. Charles Fonda, thus eliciting a worthless opinion as to residual capacity which failed as a matter of law to measure up to the substantial evidence rule; that he failed to submit to the vocational expert important medical evidence which substantiated the plaintiff's claim for benefits; that he excluded an important report from a psychiatrist, Dr. Walter Abeles, because he was a Veterans Administration doctor; that he excluded other Veterans Administration doctors' reports and hearing records which resulted in a 100% disability finding by the Veterans Administration; that the vocational expert's opinion was predicated only on an assessment of the plaintiff's physical condition; that the vocational expert's testimony was of the most conjectural, speculative

and theoratical nature; that the Administrative Law Judge failed to consider the combined and augmenting effect of all of the plaintiff's impairments; and that he completely disregarded the testimony of the plaintiff as to the subjective effects of his impairments and the extensive symptomatology.

Parallel and in point is the case of CHESTER v. MATHEWS, 403 F. Supp. 110 (1975). In that case the H.E.W. Appeals Council had reversed a favorable decision of an Administrative Law Judge. There, Chief Judge Northrop, District of Maryland stated:

> "A second significant aspect of the hearing judge's reversed findings was that he reached his ultimate conclusion of disability on the strength of a combined assessment of plaintiff's various ailments and complaints. This was a proper approach. COMBS v. WEINBERGER, 501 F. 2d 1361, 1363 (4th Circ. 1974); LACKEY v. CELEBREZZE, 349 F. 2d 76, 79 (4th Cir. 1965). The Appeals Council's, on the other hand, falls short in this regard. While it comprehensively surveys each of plaintiff's medical problems, it analyzes their effects in isolation. Nowhere does it speak to the combined effect which the hearing judge found persuasive. The Appeals Council placed primary emphasis on Dr. Antlitz' report, but that report only purported to base its conclusions about the patient's capabilities on the effects of the heart disease. ---- thus, the Appeals Council's decision cannot be said to be based

on substantial evidence. COMBS v. WEINBERGER, supra. Last, but not least, in this Court's finding of a lack of substantial evidence for the Appeals Council's decision in this case, is the Council's inappropriate handling of the vocational aspect of plaintiff's predicament. It had the burden of coming forward with evidence that the claimant could perform some job other than his usual occupation. This burden could not be met merely by administrative notice or by analysis of medical reports. Here the Appeals Council attempted to use the testimony that had previously been given by the vocational expert before the hearing judge. This was error. A vocational expert's opinion in a disability case is only worthwhile if it is based on a consideration of all other evidence that has been brought out in the case. GLASS v. WEINBERGER, CCH Unemployment Insurance Reports (Federal transfer Binder, Jan. 1975 - Jan. 1976) P. 14,210 (3rd Cir. June 9, 1975); DAVIS v. WEINBERGER, Civil No. Y-74-546 (D. Md., April 23, 1975). The vocational expert's testimony, as used by the Appeals Council in this case, is fatally deficient in this regard for it obviously was not based on any of the findings of Dr. Antlitz on which the Appeals Council placed primary focus. Those findings had not even been made when the testimony was given." (Emphasis supplied.)

The chief medical evidence in the instant case consisted of

7 reports, to wit: those of Drs. Pross, Illovsky, Abeles, Weiselberg, Turkell, McHugh and Rudoy. Present also were Veterans Administrati. medical and hearing records, on the basis of which they had found 100% unemployability. (TR 104-113)

Only one of the above was the plaintiff's personal physician - Dr. Pross. All the others were Government-employed doctors, who n less supplied a mass of eminently substantial evidence in su of the plaintiff's case.

However, the master fact which at once shows the fatal deficiency of the vocational expert's testimony is that only the reports of Drs. Pross and Illovsky were submitted to Dr. Fonda, the vocational expert. The findings of Drs. Weiselberg, Turkell, McHugh and Rudoy had not even been made when Dr. Fonda's testimony was given on March 13, 1975 (TR 122, 124-127, 129-130, 131-136). The latter were admitted into evidence June 2, 1975, but they were never submitted to Dr. Fonda (TR 52). Also received after Dr. Fonda's testimony was a report from the Veterans Administration proving that there was clinical data and roentgenological evidence of lumbar spine impairment. (TR 120).

It must be remembered that Dr. Fonda was present during the entire hearing and necessarily was a witness to every reaction, comment, gesture and influence of the Administrative Law Judge, upon whose request he had been called as a vocational expert. Admittedly, at the hearing, regarding the plaintiff's back impairment there were in evidence only the conclusions of Drs. Pross and

Ramirez, and no x-rays.

The Administrative Law Judge made his denigration and disregard of "this kind of statement" patent at once to the vocational expert who was about to testify. In addressing the Disabled American Veterans representative, a non-lawyer, the Administrative Law Judge said:

> "Now, Counsellor, this kind of statement is nonsense. To tell me he has strong lumbar pains with irrigations of (inaudible). (sic) What did he do to find this out? What do the x-rays show? What do the x-rays tell me?" (TR 36)

Obviously, the transcript should read "irradiations to both legs" for "irrigations of (inaudible)". (TR 103).

And:

> "ADMINISTRATIVE LAW JUDGE: I can tell you what I'm going to do. I'm going to send him back for an orthopedic examination by Social Security for the State Agency. I'm also going to request a complete neuro-psychiatric evaluation for our purposes ..... I'd like to see how severely disabled he is for our purposes.
>
> Our definition of disability is entirely different from the V.A. ..... and, <u>after this hearing is over</u>, I will make my request and he will be examined." (TR 44). (Emphasis supplied)

And further at TR 52:

"I'm gonna (sic) send him back for an orthopedic and psychiatric evaluation. I wanna (sic) know exactly how severely disabled he is."

Parenthetically, at this point, so that a searching and close review may be had of the entire atmosphere in which the hearing was conducted, in the presence of the vocational expert, the Administrative Law Judge described a most inordinate and peculiar understanding of the standards to be applied, thus stating:

"Certainly, from the DAV, you know that there are many veterans without arms and legs, but they work every day. And if they work every day, they are capable of substantial gainful employment; and so, under the definition of this law, they're not entitled to benefits.

And that is, in substance, the definition of the Social Security Law. And that's why we have Dr. Fonda here. He's a Vocational Expert." (TR 28, 29)

In any event, the major portion of medical evidence having not yet been produced, and the Administrative Law Judge having characterized Dr. Pross' "kind" of report as "nonsense", the Vccational Expert testified:

"A. Well, of course, the observations that I've been able to make today and the information in the file doesn't present to me conclusive indications of unemployability.

....., his physical condition seems not to be overwhelmingly incapacitating." (TR 48).

(Emphasis supplied).

And he went on to testify that he "would think that perhaps ..... he might need to find" sedentary jobs not making "much physical demands on the Individual" (TR 48, 49).

And further, since one aspect of plaintiff's former occupation involved some work as "an analyst" ... "this was presumably along the lines of work I had in mind" (TR 49); and that "there are occupations of a manual nature that make minimal physical demands on an individual," (TR 50); and "there is nothing .... that would contraindicate this type of work." (TR 51). (Empahsis supplied).

There are several revelations in this testimony which immediately demonstrate its fatal deficiency.

First, we have already discussed that the vocational expert never saw the corroborating evidence which validated Dr. Pross' conclusions, to wit: Veterans Administration x-ray reports showing lipping of lumbar bodies and some compression of disc between L5/S1 ---- "lumbosacral belt advised"; (TR 120) Government-assigned Dr. Weiselberg's x-rays showing scoliosis of lumbar spine, minimal spurring in the margins of L2, L3 and L4, osteoarthrosis (sic) of lumbar vertebral bodies (TR122); and report of Dr. Turkell, likewise a Government-assigned orthopedist, who found in Dr. Weiselbergs x-rays the same conditions, but more, to wit: a 6th lumbar sacralized vertebra, and that plaintiff had physiological discogenic

changes (TR 124, 127).

Second, clearly the Vocational Expert rendered an opinion addressed to physical capacity and physical demands. There was no assessment of the effect of plaintiff's psychiatric impairment, in combination with the physical impairments. The major psychiatric evidence had not yet been received. There was a lengthy report in file at the hearing from a Veterans Administration psychiatrist, Dr. Walter Abeles, that plaintiff was severely incapacitated by his psychiatric ailment. (TR 111-113), but this was completely disregarded and not considered at all. Clearly, the Administrative Law Judge had indicated, within the hearing of the Vocational Expert, that he felt Veterans Administration findings were not binding on him (TR 48).

While we concede, that under the Regulations, 20 CFR, the finding of another agency is not binding on the Administrative Law Judge, some weight should have been given to it in assessing plaintiff's condition. VICARS v. GARDNER, 285 F. Supp 527; SKELELS v. RICHARDSON, 453 F. 2d 882; HASH v. RICHARDSON, 323 F. Supp 267 (D.C. Va. 1971). This will be discussed in POINT III. Whether the Administrative Law Judge agreed with the Veterans Administration finding of 100% unemployability (TR 104) or not, the psychiatric report of Dr. Abeles should have been considered by the Administrative Law Judge. Nowhere in his evaluation, discussion or findings did he allude to Dr. Abeles' report. (TR 11-13).

Third, both the Vocational Expert and the Administrative Law Judge in his decision (TR 13) completely misconceived where the burden of going forward lay, once the plaintiff had demonstrated his inability to do his former, usual work. KERNER v. FLEMMING, supra; BLALOCK v. RICHARDSON, supra; TAYLOR v. WEINBERGER, supra; HERNANDEZ v. WEINBERGER, supra; MENESES v. SECRETARY, supra. The "Burden of Proof" has already been discussed in POINT I.

So, that both demanded of the plaintiff conclusive proof of his unemployability "by virtue of his physical conditions". (TR 3, 48, 51).

We respectfully submit that at that point the burden was on the Secretary to show not by conjecture, speculation and theories of the Vocational Expert as to what he "would thing ---- perhaps" (TR 48, 49); and what he "presumably had in mind" (TR 49); based on "published documents" and by checking the newspapers (TR 46); but by substantial evidence and an assessment of the combined effects of plaintiff's inpairments that there were specific jobs which the plaintiff could do to a substantial gainful degree, actually and not apparently.

The District Court stated in EDWARDS v. CELEBREZZE, 220 F. Supp. 79, (S.C. 1963),

> "*****
> The Examiner concludes that plaintiff has available to her opportunities for substantial gainful employment in light or sedentary work but such conclusion is conjectural and speculative under the test laid down in KERNER v. FLEMMING

(C.A.2, 1960) 283 F. 2d 916, 921, recently re-affirmed in POLLAK v. RIBICOFF, supra, and adopted by the Ninth Circuit in GRAHAM v. RIBICOFF 9C.A.9, 1961), 295 F. 2d 391, 394. The rule formulated in the KERNER case is that the determination of an applicant's ability to engage in substantial gainful activity

> "required resolution of two issues -- what can applicant do, and what employment opportunities are there for a man who can do only what applicant can do"

KERNER v. FLEMMING, supra, 283 F. 2d at 921; GRAHAM v. RIBICOFF, supra, 295 F. 2d at 394. The Examiner's finding that plaintiff could engage in light or sedentary work is without factual support in the record and thus violates the above rule, i.e., there is no "substantial evidence" in the record to support the Secretary's findings that Mrs. Edwards is able to engage in some form of substantial gainful employment of a light or sedentary nature."

"The plaintiff does not have the burden to introduce evidence to negative every imaginable job open to a woman with her impairments, and of her age, experience and education, it is enough if she offers evidence of what she has done, of her inability to do that kind of work any longer, and of her lack of particular experience for any other type of job. See, RICE v. CELEBREZZE, (C.A.6, 1963) 315 F. 2d 7.

The Hearing Examiner apparently gave little consideration to the evidence that points to plaintiff's complete inability to do any sustained activity. The record discloses that plaintiff has asthma and complains of shortness of breath or exertion and "no breath" to carry on any sustained activity; that she has pulmonary fibrosis and emphysema; that she has rheumatoid arthritis involving multiple peripheral joints, one of her wrists is stiff, all of which seriously impair

her ability to hold down any position requiring continuous attention or activity. The record does not disclose any evidence that there are employment opportunities available for the very limited and uncertain services plaintiff offers "If there is no market for the services he is able to render then he is truly disabled within the meaning of the statute."

In the case of BAKER v. GARDNER, 362 Federal Reporter, 2d 864, 868, 869, 870, the District Court was reversed by the Circuit Court of Appeals (C.A.Pa.1966) and disability benefits granted and part of its opinion follows:

"*****
In applying the second part of the test, the district court held that plaintiff did not meet his burden because he did not offer evidence that there were no employment opportunities in the community for a man in his condition or that employers had refused to hire him because of his alleged impairment. This was error. A claimant is not required to go down a list of jobs and disprove his capacity for each of them or their availability to him as an actual opportunity for employment. COCHRAN v. CELEBREZZE, 4 Cir 1963, 325 F. 2d 137; JARVIS v. RIBICOFF, 6 Cir. 1963, 312 F. 2d 707. It is sufficient if a plaintiff offers evidence of an impairment, his work experience, his inability because of the impairment to do that work any longer, and his lack of particular experience for any other type of job. If there are other kinds of work available for which the plaintiff is suited, the Secretary must adduce some evidence from which a finding can be made that he can do some type of work, actually and not apparently. BUJNOVSKY v. CELEBREZZE, supra, 343, F. 2d at page 871; TORRES v. CELEBREZZE, 1 Cir. 1965, 349 F 2d 342;

JARVIS v. RIBICOFF, supra, THOMPSON v. CELEBREZZE, 6 Cir. 1964, 334 F. 2d 412. In the absence of such a showing by the Secretary, a determination contrary to the plaintiff is not supported by substantial evidence. BUTLER v. FLEMMING, 5 Cir. 1961, 288 F. 2d 591, 595; KERNER v. FLEMMING 2 Cir. 1960, 283 F. 2d 916, 921-922. The hearing examiner found that plaintiff "can no longer work in the mines because of the exposure to dust and that he would probably have been unable to return to the mines during the period at issue." Presumably, this included a finding that plaintiff could not return to the heavy laboring job outside the mines, since the hearing examiner limited consideration of employment opportunities for plaintiff to light and sedentary type work. The Secretary did not agree, however, that plaintiff had shown his lack of particular experience for any other type work because of his long experience as a motorman which the Secretary concluded provided him with skills that were easily adaptable to other industries. It is not incumbent on a plaintiff to prove that a skill acquired and applied in a certain way in one industry cannot be applied in the same or similar way in another industry. He is not required to show that he lacks capacity for employment opportunity in many jobs in many industries. COCHRAN v. CELEBREZZE, supra. The Secretary's reliance on DUPKUNIS v. CELEBREZZE, 3 Cir. 1963, 323 F. 2d 380, is misplaced. In DUPKUNIS the claimant, after leaving the mining industry because of silicosis, actually obtained and adequately performed a job with Bethlehem Steel Company until he was laid off. He could not perform his former work as a coal miner, but he did not show he could not perform his former work with Bethlehem Steel Company.

The plaintiff showed that his impairment prevented him from performing his former work and his lack of particular experience for any

other type job. The hearing examiner relied on Dr. Hale's findings. He interpreted them to mean that plaintiff could perform work of a light or sedentary nature, and listed 12 light or sedentary jobs, such as Door Tender, Bundler and Baser, which he believes plaintiff could perform. The hearing examiner stated that these jobs existed in the economy in general and in plaintiff's area of residence. These findings were based on the hearing examiner's reference to the Dictionary of Occupational Titles, Volumes I and II, and the Estimates of Workers Trait Requirements for 4,000 Jobs, published by the United States Department of Labor, and the United States Census of Population, 1960, Pennsylvania. They do not supply substantial evidence to overcome the plaintiff's case."

****

"We conclude, therefore, first, that the Secretary has applied too strict a standard in this case. Not only must '(t)he capabilities of the individual * * * be viewed in context with his own physical, educational, and vocational background', * * * but also the following question must be asked and resolved: '(W)hat employment opportunities are there for a man who can do only what applicant can do" Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available'. *** Second, when the record is tested by the principles set forth above, there fails to appear substantial evidence to support a finding necessary to the Secretary's determination of no disability, viz., that there existed a reasonable opportunity for Hodgson to engage in substantial gainful employment. Neither the bare suggestion in a medical report that the claimant might be able to operate any elevator nor the less specific allusions in the reports to 'a sedentary job', 'some standing job' and 'one in which walking is at a minimum constitute such evidence". In this connection,

in THOMAS v. CELEBREZZE, 4 Cir. 1964, 331 F. 2d 541, the court said:

> "Employers are concerned with substantial capacity, psychological stability, and steady attendance; they will not unduly risk increasing their health and liability insurance costs. It is unrealistic to think that they would hire anyone with the impairments of this claimant."

The court in STANCAVAGE v. CELEBREZZE, supra rejected as substantial evidence the same industrial studies cited by the hearing examiner:

> "We recognize that the use of governmental and industrial studies such as the one referred to by the Appeals Council in the present case has been permitted without objection on occasion and approved of as warranting the Secretary's determination of what employment opportunities are available to a claimant. Having in mind the sincere, practical administration of the Act, however, we are not persuaded that such evidence moves far enough away from the realm of conjecture and theory when applied to the facts before us. It is too much akin to the employment Hodgson was supposed to be able to secure as an elevator operator. The suggestion that there is a list of '221 jobs that can be performed by persons with minimal education and that are sedentary in character or require only light

exertion' is not very meaningful. There must be something more tangible establishing what employment opportunities there are for a man with his impairment. The failure of the Secretary to establish the existence of that kind of genuine employment opportunity is patent. *** (Footnotes omitted)"

"Merely citing catalogues which list capsule descriptions of thousands of jobs available to prospective employees is not sufficient." RAY v. CELEBREZZE, 4 Cir. 1961, 340 F.2d 556. Such studies have been rejected as substantial evidence even when the testimony has come from Vocational Counselors specially engaged by the Government."

****

"Viewing the record as a whole, the evidence falls short of showing genuine employment opportunities available to this 62 year old plaintiff with his background, education and physical condition. The judgment will be reversed with direction to the District Court to enter an Order requiring the Security to grant the plaintiff's application for disability benefits and for a period of disability"

In ORZEL v. FINCH, 445 F. 2d 150 (7th C.C.A. 1971) the Court said,

"But other factors, extraneous to a physical diagnosis, enter into an evaluation of a claimant's ability to work. **** the mere physical ability to perform a task does not establish that claimant could perform it, nor perform it with the speed and skill required of an employee in the competitive labor market."

In the case of TOWNSEND v. COHEN, 296 F. Supp., 789, 794, the District Court reversed a decision disallowing disability

benefits because the Secretary's determination was not supported by substantial evidence, and said:

> "Plaintiff having met his burden of proof of disability to engage in his prior occupations, the burden of proof shifted to the Secretary to prove that other jobs, which were within plaintiff's competence, were available to him. BAKER v. GARDNER, 352 F. 2d 864, 868 (3rd Cir. 1966); BUJNOVSKY v. CELEBREZZE, supra, 343 F. 2d at p. 871. In order to meet his burden of proof, the Secretary must prove that there existed reasonable employment opportunities for plaintiff. In discussing the Secretary's burden of proof, the Court of Appeals for the Third Circuit has said:
>
> > "Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available." JANEK v. CELEBREZZE, supra, 336 F.2d at p. 833.
>
> Whether a reasonable opportunity existed is to be determined in the light of the claimart's impairments, age, education, training, work experience, and the labor market. BUJNOVSKY v. CELEBREZZE, supra. Cf. JANEK v. CELEBREZZE, supra; HODGSON v. CELEBREZZE, supra.
>
> Although the medical evidence supports a conclusion that plaintiff could perform light or sedentary work, the issue is whether in 1964 he had a reasonable opportunity to secure such employment on a regular, full-time basis.

The hearing examiner's conclusion that plaintiff was not precluded from substantial gainful activity rests on the testimony of a vocational consultant. This witness gave his opinion that there were a number of light or sedentary jobs which the plaintiff could perform. The consultant heard plaintiff's testimony at the hearing and otherwise formed his opinions from a review of the documentary evidence. He conducted no tests or personal interviews. He testified as an expert witness in response to hypothetical questions. For documentation of job requirements, he relied upon descriptions selected from the Dictionary of Occupational Titles and other similar sources. Reliance on such catalogue studies as evidence of ability to do gainful work has repeatedly been disapproved. Moreover, there is no evidence that, considering plaintiff's age, education, work experience, training and the labor market, the plaintiff had a "reasonable opportunity" to secure employment at any time between December 31, 1961 and June 30, 1964.

There is substantial evidence in addition to the medical evidence which would support a finding of disability. The defendant testified that he has back and chest pain, and that he cannot sit or stand for more than an hour and a half without discomfort. He has shortness of breath after moderate activity such as climbing a set of stairs. Although these symptoms would not support a finding of disability, absent a medically determined impairment, they are nonetheless substantial evidence of the severity of plaintiff's impairment which has been medically determined. Furthermore, since 1940 plaintiff has had

effective vision in only one eye. He has no special skills or training except in coal mining. Not only was he admittedly incapable of performing this occupation, but also he has been declared disabled due to Silicosis by the Pennsylvania Workmen's Compensation Board.

In view of this evidence and because the Secretary's determination is not supported by substantial evidence, the decision disallowing disability benefits must be reversed."

In a case involving a stevedore, KLIMASZEWSKI v. FLEMING, 176 Federal Supplement, 932 (D.C. Pa. 1959), the Court granted summary judgment for plaintiff with these words,

"The Appeals Council itself states that "it seems clear that the claimant because of his stiff leg could not return to his stevedoring work or ordinary manual labor or work involving a great deal of walking or stooping." It may then be inquired: What other work is available for this claimant? The Appeals Council was not specific here, but merely adjudged that his condition did not preclude the claimant from engaging in any substantial gainful activity. It is obvious that with his limited education, be it two or six years, the claimant is ill-suited for any clerical job. His earning power is limited by his strength and physical fitness. Thirty-one years as a stevedore is hardly qualification for any task which requires skilled manual dexterity or the use of figures or letters. According to the claimant's uncontroverted testimony, he is not able even to stand still for any long period of time. Of course, it

may be conceded that with the use of great imagination and even greater ingenuity, conceivably a paying job might be found for Klimaszewski. The Court, however, can presently perceive none and the Social Security Administration has not suggested any work for Klimaszewski except as a night watchman, or as stated in the Administration's brief, "bench work" or some other "employment in a light manufacturing plant."

Except for employment as a night watchman, which we think is not reasonably available in view of the claimant's limited ability to get about, the suggested lines of employment are cast in general terms. (It is a fact, of course, that old employees with decrepitude are employed as night watchmen but usually by a former employer who desires to reward long service. The record is devoid of any suggestion that Klimaszewski's former employer, a stevedoring company, has offered him a night watchman's job or any similar suitable employment) There is no demonstration by way of evidence or argument that this claimant is qualified to engage in any substantial gainful activity is not adequately countered by the Administration's suggestions of possible employment.

The word "any" must be read in the light of what is reasonably possible, not of what is conceivable. The statute must be given a reasonable interpretation. It is a remedial statute and must be construed liberally. It was not the intention of Congress to impose a test so severe as that required by the Secretary and to exact as a condition precedent to the maintenance of a claim the elimination of every possibility of gainful employment.

> On the entire record the Court concludes the denial of disability benefits to the claimant was erroneous.
>
> The motion of the claimant will be granted and summary judgment will be entered for him. The motion of the Secretary for summary judgment will be denied."

Testimony of Vocational Advisors similar to that of Dr. Fonda have been critized by the Courts who are unpersuaded thereby as discussed by the Court in KELLY v. COHEN, 293 F. Supp. 261, 265 (W.D. Pa. 1968) with these remarks,

> "II. Ability to Engage in any Substantial Gainful Activity
>
> (9) The Vocational Consultant's testimony in support of the Examiner's findings was restricted to responding to a hypothetical question listing plaintiff's impairments (as viewed by the Secretary), which is the proper procedure. WOOLEY v. GARDNER, 283 F. Supp. 576 (E. D. P. 1968), and listing five job classifications from the Dictionary of Occupational Titles ("D.O.T."), plus plaintiff's former occupation of tavern keeper (TR 72-74). These classifications were considered to reflect light and sedentary work and to be readily available in the Johnstown, Pennsylvania area.
>
> (10) On cross-examination by plaintiff's attorney the consultant admitted that the plaintiff's coughing could be both an impediment to obtaining a job and a health hazard (TR 75). This is important in assessing the realistic nature of the Secretary's

evidence as to ability to ergage in gainful activity, and in this case strongly militates against such realism. DABRAVALSKIE v. GARDNER, supra, 281 F. Supp. at 923.

(11) Additionally, the use of the D.O.T. has been repeatedly condemned as speculative and insufficient evidence of ability to engage in substantial gainful activity, both before, HODGSON v. CELEBREZZE. 357 F. 2d 750 (3 Cir. 1966); SELDOMRIDGE v. CELEBREZZE, 238, F. Supp. 610. (E.D. Pa. 1964), and after, OLENCHICK v. GARDNER, 284 F. Supp. 304. (W.D.Pa. 1968); BATOVICH v. GARDNER, 286 F. Supp. 962 (W.D.Pa. 1968, the 1967 amendments to the statutory definitions of disability, 158(e) of P. L. 90-248, such amendments applying to this case.

(12, 13) The greatest deficiency in the Secretary's evidence surrounds three of the D.O.T. classifications cited by the Vocational Consultant and the former occupation of tavern keeper. With the exception of cashier and sales clerk, these categories describe jobs which the plaintiff has been performing since he left the mines. There is uncontradicted evidence in the record that plaintiff's ability to perform these tasks has steadily decreased since he started to operate the tavern, to the point where he can no longer perform them for any significant length of time, if al all (T.P. 51-56, 62). Additionally, the record is replete with the plaintiff's complaints concerning shortness of breath, inability to walk for more than several blocks under ideal conditions, difficulty in climbing stairs, need for prolonged periods of rest during the day, loss of grip, et cetera. The effect of plaintiff's inactivity on the earnings of the tavern has been

significant and he states that the tavern will soon have to be closed altogether as his wife cannot handle it alone. The plaintiff cannot, in fact, do what the Secretary says he can do. Since the Secretary has ignored the best evidence of plaintiff's ability to engage in substantial gainful activity and has relied on evidence which is merely speculative, based on the record before us, his conclusion cannot stand. See BAKER v. GARDNER, 362 F. 2d 864, 868 (3 Cir. 1966), distinguishing DUPKUNIS v. CELEBREZZE, 323 F. 2d 380 (3 Cir. 1962). In this second part of the test of disability, the inquiry focused on the individual claimant and not the hypothetical average man. MATIAS RIVERA v. GARDNER, 286 F. Supp. 305 (D.C.P.R. 1968); DABRAVALSKIE v. GARDNER, supra. On the whole record as submitted, this Court concludes that the plaintiff is entitled to the benefits provided in the statute. The conclusion is based on a review of the record which in turn shows that there is no substantial evidence to support the Secretary's conclusion that the plaintiff can engage in substantial gainful activity.

ORDER

And now, November 7, 1968, for the reasons mentioned in the foregoing opinion; the motion of the defendant for summary judgment is denied. The motion of the plaintiff, Raymond R. Kelly for summary judgment in his favor is granted.:

The foregoing decisions and the facts can only progress towards an evaluation that the Vocational Expert's testimony

must be regarded as fallacious. The Vocational Expert did not therefore supply any relevant evidence which a reasonable mind might accept and which would support a conclusion that plaintiff could perform substantial gainful activity in light, sedentary jobs.

The Administrative Law Judge was more concerned with the plaintiff's occasional attendance at a veterans' meeting, with his occasional getting of his own coffee or breakfast in his sister's absence and because a neighbor came in to look in on him or visit in the morning. In his decision he characterized these as "daily activities, e.g., ability to attend meetings, work around the house and mingling with people." (TR 13)

In ANKNEY v. RICHARDSON, U.S.D.C., W. Dist. of Michigan, S. Div. Civ. No. 6079, 4/19/72 CCH U.I. Reports 6/6/72, in discussing the Hearing Examiner's failure to credit the claimant's testimony and unreasonable treatment of alleged discrepancies, and the substantial evidence rule, Chief District Judge Fox said:

> "For the defendant to lint-pick this plaintiff's obviously and demonstrable aggravated condition of chronic urinary retention, partial blindness, recurrent arthritis and stomach ulcer by maintaining that he clearly cannot bend, lift or stand, he may be able to sit, is both to oversimplify the issue in this case and to resist the fundamental thrust of the Social Security Act - - - - - - - -
>
> The proposition is by now well recognized in this circuit and across the land that the Social Security statute "should be liberally construed in favor of disability" Polly v. Gardner 364 F 2d 969, (6th Cir. 1966) at 974."

It is submitted that to receive benefits under the Social Security Act, plaintiff need not be completely helpless or unable to function, or be bedridden or hospitalized.

> "the mere fact that he is mobile and able to engage in some light tasks at his home does not alone establish that he is able to engage in substantial gainful activity" MULLEN v. GARDNER, 256 F. Supp. 588, 591 (E.D.N.Y. 1966)

On this point is pertinent the language of Judge Judd (E.D. N.Y. 1970) in STEWART v. COHEN, 309 F. Supp. 949 referring to Section 223 (d) (2) (A) of the Social Security Act as holding with emphasis added by the Court,

> "that he is not only able to do his previous work but cannot, considering his age, education and work experience engage in any other kind of substantial gainful employment.
>
> A person need not be unable to do <u>any</u> kind of work before he is qualified for benefits under this definition. WALLACE v. FINCH, 303 F. Supp. 351 (W.D. Ark. 1969). He must be unable to do any <u>substantial</u> work, considering the factors listed.
>
> Thus an individualized standard has been established by Congress and the facts of each case must be scrutinized before deciding that a person is capable of doing substantial employment. What may be substantial gainful employment for an individual with one combination of age, education and

> work experience, may not be the same for another. BLANSCET v. RIBICOFF, 201 F. Supp. 257, 261-265 (W.D. Ark. 1962)
>
> **********
>
> (4) Congress having inserted the adjective "substantial" before the phrase "gainful employment", we cannot presume that the bare existence of some jobs in the national exonomy is enough to disqualify an individual from benefits if he is not yet able to hold a "substantial" job."

The tendency of the Court is to find disability and authorize disability benefits without the necessity of being helpless or unable to function as was considered in the case of GOLD v. SECRETARY OF HEALTH, EDUCATION AND WELFARE, 463 F. 2d 38, where on appeal from a summary judgment in the District Court granted by Chief Judge Jacob Mishler, denying disability benefits, the Circuit Court of Appeals reversed such judgment and authorized payment of benefits holding that the record established that claimant had suffered from chronic degenerative diseases of the lungs, exacerbated by other medical problems, so that she could not work.

In ROSIN v. SECRETARY OF HEALTH, EDUCATION AND WELFARE, 379 F. 2d 189 (9th Cir. 1967), the Circuit Court of Appeals reversed the District Court's finding of no disability, stating that,

> (3) The District Court further found that "the plaintiff is qualified and physically able to engage in other work which would amount to substantial

evidence in the record to support this finding.

(4,5) To satisfy the statutory requirement that a claimant be unable to engage in any substantial gainful activity, it is not necessary that he introduce evidence which negatives every imaginable job open to men with his impairment, age, experience and education. HAYES v. CELEBREZZE, 5 Cir., 311 F. 2d 648; RICE v. CELEBREZZE, 6 Cir., 315 F. 2d 7; CELEBREZZE v. WARREN, 10 Cir., 339 F. 2d 833; CUTHRELL v. CELEBREZZE 4 Cir., 330 F. 2d 48. All that is required of the claimant is that he be unable to do the type of work that he was formerly engaged in and demonstrates his lack of particular experience for any other type of work. JARVIS v. RIBICOFF, 6 Cir., 312 F. 2d 707; DUPKUNIS v. CELEBREZZE, 3 Circ. 323 F 2d 380; TORRES v. CELEBREZZE, 1 Cir., 349 F. 2d 342. Once the claimant has demonstrated that he can no longer engage in his former occupation, it is incumbent on the Secretary to show that there are other types of work which the claimant is capable of doing. McMULLEN v. CELEBREZZE, supra; TORRES v. CELEBREZZE, supra; THOMPSON v. CELEBREZZE, 6 Cir., 334 F. 2d 412; CARDEN v. GARDNER, 6 Cir., 352 F. 2d 51. Such proof must not be based on the claimant's mere theoretical ability to do some kind of work, but must be based on practical and realistic considerations, such as education, experience, emotional and physical condition and reasonable job opportunities available within the area in which claimant lived. KERNER v. FLEMMING, 2 Cir., 283 F. 2d 916; KUPKUNIS v. CELEBREZZE, supra, RIBICOFF v. HUGHES, 8 Cir., 295 F.2d 833; CELEBREZZE v. BOLAS, 8 Cir. 316 F. 2d 498; HENNINGER v.

CELEBREZZE, 6 Cir., 349 F.2d 808.

> "It is the duty of t
> Secretary to protect the public
> funds from malingerers; but
> where, as here, the possibilities
> of obtaining employment are
> practically nil, it is no answer
> that the claimant may be theoretically
> capable of performing some one of the
> 'non-physical, observational' jobs
> contained in an exhaustive list
> covering places and circumstances
> utterly irrelevant to her situation.
> Employers are concerned with
> substantial capacity, psychological
> stability, and steady attendance;
> they will not unduly risk increasing
> their health and liability insurance
> costs. It is unrealistic to think
> that they would hire anyone with
> the impairments of this claimant".
> THOMAS v. CELEBREZZE, 4 Cir., 331
> F. 2d 541.

In concluding this point, we refer to the Administrative Law Judge's findings of facts. (TR 14)

Referring first to Finding No. 3, the hearing judge found separately and in isolation (a) that plaintiff "has a moderate nervous condition", which was completely against the weight of all the undisputed evidence, and contrary to his own assessment that "the facts are clear that this claimant does have a significant psychiatric condition" (TR 13); (b) that plaintiff does not have any orthopedic condition, when a mass of medical evidence supported by x-rays showed the exact opposite; and (c) that he did not have any significant hearing condition, although he was completely deaf in his left ear and partially deaf in his right ear.

Examination of Finding Nos. 4 and 5 addressed themselves, in isolation, only to a purported physical residual capacity and drew conclusions completely unsupported by any substantial evidence that this claimant, significantly impaired psychiatrically, who suffered black outs, loss of balance, severely incapicitating anxiety neurosis and all the other symptomatology related in FACTS, P. 7-9, and incorporated here to avoid extensive repetition, without any testimony by the vocational expert showing any evidence of any transferable skill to operate power presses, and the like, or to be trained for it, could do the jobs proposed, on a purely speculative and theoretical basis, to a substantial, gainful degree.

POINT III

THE DETERMINATION OF THE U.S. VETERANS ADMINISTRATION THAT PLAINTIFF WAS TOTALLY DISABLED IS ENTITLED TO SOME WEIGHT IN ASSESSING HIS CONDITION

In the instant case an award was made to the plaintiff by the U.S. Veterans Administration at a rate of $584.00 per month because of his 100% unemployability. Concededly, such a finding is not conclusive or binding upon the Social Security Administration. Nevertheless, such prior determination of disability should have been considered by the defendant and given some weight in the overall appraisal of plaintiff's condition.

VICARS v. GARDNER, 285 F. Supp 527

SKELELS v. RICHARDSON, 453 F. 2d 882

HASH v. RICHARDSON, 323 F. Supp 267 (D.C.Va. 1971)

At the very least, even though feeling at liberty, albeit incorrectly, to disregard the above conclusion or determination, the Administrative Law Judge should have considered the underlying report of Dr. Walter Abeles, a psychiatrist. (TR 111-113). To completely disregard such prior determination of a Federal Agency, or at least its doctors, was inequitable and contrary to the express intent of Congress that the Social Security Act be administered and construed liberally. This the Administrative Law Judge failed to do.

POINT IV

THE SECRETARY'S TOTAL DISREGARD OF PLAINTIFF'S TESTIMONY AND SYMPTOMATOLOGY IS ERROR AND RENDERS HIS DECISION UNSUPPORTED BY SUBSTANTIAL EVIDENCE

It has been held that the Secretary must explicitly consider the claimant's subjective symptoms. DePAEPE v. RICHARDSON, 464 F. 2d 92, 99 (5th Cir. 1972); SMITH v. WEINBERGER, 394 F. Supp. 1002, 1006 (D.Md. 1975); that his findings must be detailed and explicit, even to the extent of including findings of subordinate facts upon which ultimate facts are based. SMITH v. WEINBERGER, supra; BAERGA v. RICHARDSON, 500 F. 2d 309, 312 (3rd Cir. 1974).

While the Secretary has a right to reject such subjective evidence, REYES ROBLES v. FINCH, 409 F. 2d 84, 87 (1st Cir. 1969), the failure to do so explicitly leads to the conclusion that such evidence has not been considered at all. SMITH v. WEINBERGER, supra; BAERGA v. RICHARDSON, supra.

The plaintiff testified and signed statements before the Social Security Administration that he can only walk 2 blocks, he passes out at times, he loses his balance, he cannot stay in any one place for any length of time, he doesn't sleep at night, he suffers headaches and dizziness, his hearing is impaired, he is severely depressed, lacking in confidence in the business world and socially, he cannot travel alone or drive a car and his brother drives him whereever he has to go, he lives with his brother and sister and was never married, new situations cause him great

anxiety, he has to sleep on a board and wears a back brace, he cannot walk more than a couple of blocks, because of recurring, stabbing pain in his back it takes a half- or three-quarters hour to get out of bed in the morning, he must use a long-handled shoe-horn to put on his shoes, sometimes he needs help in putting on his stockings and shoes (TR 39).

He testified further that he takes Demerol, Myltown and Valium; and sitz baths two times a day; and applies a heat lamp to his back daily.

One thing is clear. The Government-assigned consultative doctors by and large credited this symptomatology and predicated their diagnoses and conclusions thereon as much as on their clinical data, x-rays and tests.

Indeed, Dr. Walter Abeles was of the opinion that the plaintiff did not try to exaggerate his condition; that he impressed him as being "sincere in his statement that he would more than want to be employed, rather than to have to depend on benefits." (TR 112).

Examination of the 7 facts found by the Administrative Law Judge in FINDINGS (TR 13, 14) shows that he devotes not one word to the plaintiff's symptomatology. If he disbelieved it, then he should have so found, explicitly. If it was believable in part, or in its entirety, then he should have so found.

Therefore, we respectfully submit that the Administrative Law

Judge completely disregarded the symptomatology, in clear derogation of the law and the cases.

It has been held that subjective symptoms clearly afford a basis for awarding Social Security Benefits. PLOUSE v. RICHARDSON, 334 F. Supp. 1086, 1088 (W.D.Pa. 1971); BITTEL v. RICHARDSON, supra; DePAEPE v. RICHARDSON, supra; YOUNG v. WEINBERGER, (U.S. D.C., Dist. of Md., Civ. No. 72-172N-11/14/73, CCH U.I. Reports 17,504-2/6/74).

For these reasons and those heretofore argued in Points I, II and III, we respectfully submit that the Secretary's decision denying benefits was fatally deficient, and not based on substantial evidence.

POINT V

THE SOCIAL SECURITY ACT IS A REMEDIAL STATUTE AND SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF CLAIMANTS FOR BENEFITS

This principle is well established and has heretofore been alluded to in the foregoing; and is set forth here without further discussion.

CARROLL v. SOCIAL SECURITY BOARD, 128 F. 2d 876, 881 (1942)

CARQUEVILLE v. FOLSOM, 170 F. Supp. 777, 779 (1958)

Aff'd sub nom, 263 F. 2d 875 (1959)

TUCKER v. CELEBREZZE, 232 F. Supp 209 (1963)

POLLY v. GARDNER, 364 F. 2d 969, at 974 (6th Cir. 1966).

CONCLUSION

THE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT

Viewing the record herein as a whole, it does not contain substantial evidence to support the Secretary's findings and conclusions.

On the entire case, it should be concluded that the denial of disability benefits to the plaintiff was erroneous and predicated on assumptions and evidence of dubious value, warranting the grant of summary judgment to the plaintiff, reversing the decision of the Secretary, and awarding such benefits to him.

Respectfully Submitted

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by, MORRIS RUBIN
of Counsel, on the Brief

Service of three (3) copies of
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hereby admitted this day
of , 197

Attorney for